No. 90-9 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted the AT&T consent decree to provide that uncontested petitions for waivers of the decree's restrictions are governed by the general modification standard embodied in section VII of the decree rather than the special standard embodied in section VIII(C) of the decree.

2. Whether the court of appeals was required to afford "special" deference to the district court's current interpretation of the AT&T consent decree because of the district court's familiarity with the decree.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 900 F.2d 283. The opinions of the district court (Pet. App. 62a-108a, 109a-273a) are reported at 714 F. Supp. 1 and 673 F. Supp. 525.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on April 3, 1990. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The consent decree entered in 1982 to terminate the United States' antitrust case against AT&T required AT&T to divest the Bell Operating Companies (BOCs). Pet. App. 274a-276a; see *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). The decree also placed line of business restrictions on the BOCs, generally limiting them to providing local telephone service. Section II(D), Pet. App. 277a. In particular, the BOCs were precluded from offering "information services," which include services such as LEXIS by which information stored on a computer may be accessed by telephone. Pet. App. 16a & n.5. The BOCs were also barred from providing interexchange (long distance) service and from manufacturing telephone equipment. *Id.* at 16a.

The district court agreed that the line of business restrictions were in the public interest in 1982. However, it expressed the belief that, over time, the BOCs would likely lose their ability to leverage their monopoly power into competitive markets, so that the need for the restrictions would disappear. 552 F.Supp. at 194. Retaining the restrictions once they had become unnecessary would be anticompetitive, the court noted, because they would prevent the BOCs from entering new markets. *Id.* at 195 n.264. It concluded, therefore, that the decree should provide for the removal of the restrictions if they became unnecessary.

The proposed consent decree contained a general provision, section VII, authorizing modification of the decree. In their presentations to the district court, the parties addressed the standard to govern contested motions for removal of a line of business restriction. They agreed that

the restrictions might be removed "*over the opposition of a party* to the decree when the Court finds that 'the rationale for [the restriction] is outmoded by technical developments.' " 552 F. Supp. at 195 (emphasis added). The court considered that standard too stringent, however, because it rested on the premise "that the restrictions are justified by the mere existence of monopoly power." The court also observed that the test "usually applied to a *contested* modification of a consent decree" is the *Swift* [1] standard, which requires a showing of "unforeseen conditions," and that such an approach was also too stringent. *Id.* at 195 n.266 (emphasis added). The court concluded that removal of a line of business restriction should occur upon a showing that there is no substantial possibility that a BOC could use its monopoly power to impede competition in the market it seeks to enter. It further concluded that "[t]o avoid any question about the appropriate test," the alternative standard for such contested modifications "should be explicitly incorporated into the decree." *Id.* at 195.

The district court thus conditioned approval of the decree on the addition of section VIII(C), which provides that the court "shall" remove a line of business restriction "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231. In addition, the decree as adopted contained section VII, the general provision authorizing "the modification of any of the provisions hereof." Section VII, Pet. App. 284a.[2] The court had not proposed amending or deleting section VII when it added section VIII(C).

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[1] *United States* v. *Swift & Co.*, 286 U.S. 106, 118 (1932).

[2] Section VII provides:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment,

2. The Department of Justice undertook to report to the district court on the third anniversary of divestiture whether the line of business restrictions continued to be warranted in light of competitive conditions in the various telecommunications markets. 552 F. Supp. at 195. The first triennial review report was filed on February 2, 1987.[3] After reviewing hundreds of comments on its recommendations, the Department moved on April 27, 1987, to remove the line of business restrictions except with respect to interexchange services. The seven Regional Holding Companies (BOCs)[4] moved for removal of the restrictions in their entirety.

In orders issued on September 10, 1987, and March 7, 1988, the district court, applying section VIII(C), "left largely intact the decree's so-called 'core' restrictions—those regarding interexchange services, manufacturing, and information services." Pet. App. 21a. However, the court removed the restriction on entry into non-telecommunications-related businesses and modified the restriction on information services to allow the BOCs to provide certain transmission services for information generated by others. *Ibid.*

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-59a. In portions of its

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or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

[3] The decree was entered in 1982; divestiture occurred on January 1, 1984.

[4] The 22 BOCs were integrated into seven Regional Holding Companies. These Regional Companies are also BOCs. Decree section IV(C) (Pet. App. 278a); 552 F. Supp. at 228, 232 & App. A.

decision that are not at issue here, the court of appeals upheld the district court's removal of the restriction on entry into non-telecommunications-related businesses and the district court's refusal to lift the bar on entry into interexchange and manufacturing businesses. However, the court of appeals held that the district court had erred with respect to the standard it had applied in refusing to lift the bar on entry into the information services market. Specifically, the court of appeals held that the general modification standard, section VII, applied because none of the parties to the consent decree had objected to the BOCs' entry into the information services market. Pet. App. 47a-51a. Therefore, the district court had erred in analyzing the issue under section VIII(C), which required a BOC to show that "it could not impede competition in the relevant market as it was believed it could *when the decree was approved*." *Id.* at 51a. The court of appeals did not itself analyze the restriction under the "public interest" standard of section VII, however. It instead remanded the case, directing the district court to "determine whether removal of the information-services restriction * * * would be anticompetitive under *present* market conditions." *Id.* at 55a. That question is currently under consideration by the district court.

ARGUMENT

At issue in this case is the court of appeals' construction of the terms of a particular consent decree. The court's construction, which is not challenged by any of the parties to the decree, is consistent with the decree's language and history, and the case presents no conflict with the decisions of this Court or any other court of appeals. Accordingly, further review of this interlocutory decision is not warranted.

1. A consent decree is to be construed essentially as a contract. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975). Thus, the initial guide to decree construction is the language of the decree itself, as used "in its natural sense" and in relation to its normal meaning. *United States* v. *Armour & Co.*, 402 U.S. 673, 678 (1971); *ITT Continental Baking*, 420 U.S. at 236; *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959). Aids to construction of the sort properly taken into account in construing a contract, including the circumstances surrounding the formation of the decree and any technical meaning that the words used may have had to the parties, are also appropriately considered. *ITT Continental Baking*, 420 U.S. at 238; *Atlantic Refining*, 360 U.S. at 22.

The court of appeals followed these precepts, interpreting the two modification provisions by looking "first to the text of the decree, and then, if the question remains subject to doubt, to ' "contemporaneous statements of [the decree's] objectives." ' " Pet. App. 49a. The court found, first, that section VIII(C), by its express terms, does not purport to be the exclusive standard for removing a line of business restriction, and, second, that the language requiring a "*showing* by the *petitioning* BOC" appears to contemplate an adversarial proceeding. *Ibid.*[5]

[5] Petitioners not only object to the holding that section VIII(C) applies only to contested proceedings, but claim that a motion for removal of a restriction is "contested" as long as any one of the approximately 160 parties granted intervention status by the district court in the triennial review proceeding opposes it. Pet. 18. Petitioners cite no authority for their claim, however, and the principle is patently unsound since a proposed modification to a consent decree is uncontested when none of the parties to the decree objects to it. (Nonparties may, however, comment on the propriety of a proposed modification before the district court decides under section VII whether the modification is in the public interest.)

Since section VIII(C) was "silent on the question of what standard applies to uncontested motions" and the decree makes provision for modification in section VII, the court properly looked to the circumstances surrounding the addition of section VIII(C) and concluded that those circumstances "leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII." *Id.* at 49a-50a.

As the court of appeals correctly noted, the district court added section VIII(C) to alter the parties' stated intention that *contested* motions to remove a line-of-business restriction could be granted only on a finding that the rationale for the restriction was outmoded by technical developments. Pet. App. 50a; 552 F. Supp. at 195. The district court was concerned that the restrictions might subsequently prove to be anticompetitive, and so it believed that a more lenient standard should be provided for their removal. Thus, section VIII(C) was added to supplant "[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States* v. *Swift & Co.*" Pet. App. 50a; 552 F. Supp. at 195 & n.266. A modification to which all parties to the decree consented, on the other hand, would not have been judged under either section VIII(C) or the stringent *Swift* standard. Rather, as the court of appeals emphasized, an uncontested modification subject to the general standard of section VII "should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act" (Pet. App. 26a)—the standard applied by the court in deciding whether the original terms of the consent decree should be entered.[6]

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[6] The Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h) (Tunney Act), requires district courts to determine whether proposed government antitrust consent decrees are in the public interest. The

The district court approved the inclusion of section VIII(C) because it was concerned that the decree not make it unduly difficult to remove anticompetitive restrictions. There is, accordingly, no basis for petitioners' assertion that the district court's inclusion of section VIII(C) was intended to constrict the authority of the parties to eliminate restrictions by subjecting uncontested motions to section VIII(C). And it is particularly unwarranted to assume that the district court, in requesting the parties to add section VIII(C), sought a greater role for itself in uncontested modifications than would be appropriate with respect to the initial entry of the consent decree. Accordingly, the court of appeals correctly concluded that section VIII(C) does not govern uncontested modifications.[7]

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district court has not determined whether the Tunney Act applies to this case, but the parties agreed that Tunney Act procedures should be followed when the decree was entered. See Pet. App. 14a n.1.

[7] Even if the court of appeals erred in its interpretation of the decree, the proper interplay between sections VII and VIII(C) is an issue confined to this case. Petitioners suggest (Pet. 18 & n.30), because of similarities between the decree in this case and a decree entered in *United States* v. *American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984), that the decision below conflicts with the Second Circuit's holding in that case. But the decree provision in *Cyanamid* and the circumstances surrounding its formation were quite different from those in this case. Paragraph XI of the *Cyanamid* decree contained a restriction on Cyanamid's activities *along with* a proviso for its removal. 719 F.2d at 561 (ordering Cyanamid to purchase melamine from other producers "provided that at any time after [ten years] Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly"). Here, by contrast, the decree as proposed by the parties contained the line of business restrictions in section II(D) and a general provision for decree modification in section VII. Section VIII(C) was added to provide a different standard for removal of the

2. Petitioners contend (Pet. 17-21) that the court of appeals' decision conflicts with this Court's decision in *Atlantic Refining*. In *Atlantic Refining*, the Court refused to accept an interpretation, which the government urged would more nearly effectuate the purposes of the statute on which the government's suit had been based, because that interpretation would have "substantially chang[ed] the terms of a decree to which the parties consented." 360 U.S. at 23. The Court agreed with the interpretation of the district court, finding that its interpretation had support in the language of the decree, had been accepted by the parties for 16 years of decree enforcement, and had been found to be consistent with the intention of the parties. *Id.* at 22-24.

The court of appeals' holding here is fully consistent with *Atlantic Refining*. The court of appeals did not overturn the district court's interpretation "simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place" (*Atlantic Refining*, 360 U.S. at 23-24); it did so because it found that the district court's interpretation conflicted with the language and history of the decree and the meaning that the parties intended at the time section VIII(C) was written. It is the court of appeals' interpretation—and not that of the district court—that has support in the language and history of the decree, is consistent with the intention of the parties at the time the decree was entered, and is undisputed by any of the parties to the decree.

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section II(D) restrictions where "a petitioning BOC" could make the appropriate showing. Thus, the language of section VIII(C) and the circumstances surrounding its entry show that section VIII(C) did not purport to provide the only means for modifying section II(D), whereas in *Cyanamid* it was reasonable to conclude that the standard set out in Paragraph XI applied to the restriction set out in that same provision.

Petitioners incorrectly claim (Pet. 18-19) that the court of appeals erred by failing to "accord[ ] [redacted] significance" to the fact that waiver requests have typically been decided under section VIII(C), rather than section VII. Of course, neither *Atlantic Refining* nor any other decision of this Court suggests that post-decree practices can validate a decree interpretation that is contrary to the decree language and the intention of the parties at the time the decree was entered. Moreover, the waiver history does not support petitioners' argument. As petitioners note (Pet. 9 n.15), waiver requests have routinely been handled under section VIII(C) because the district court in 1984, finding itself inundated with BOC requests for line of business waivers, established procedures for reviewing them. It ordered that each such request be presented first to the Department of Justice, which would then make a recommendation to the court. *United States* v. *Western Electric Co.*, 592 F. Supp. 846 (D.D.C. 1984), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985). For this reason, all BOC-initiated requests, even those ultimately not opposed by any of the parties, have been processed under the same procedure.

It was not until the triennial review that the government itself initiated motions for decree modifications, and the question first arose whether an uncontested modification should be evaluated under section VII or section VIII(C). When the motions for removal of the line of business restrictions were originally filed by the Department and the BOCs, however, they were filed under section VIII(C) because the Department believed that the Section VIII(C) standard was satisfied and did not know that AT&T would not oppose the motions.[8] It was not until the hearing on

[8] One BOC urged from the outset that a modification that had the joint support of the BOCs and the government should be decided under section VII. Pet. App. 123a-124a.

the motions, months after the pleadings were filed, that AT&T told the court it would not oppose removal of the information services restriction. Pet. 10 n.18. AT&T then urged the court to consider this aspect of the BOCs' petition under section VII rather than section VIII(C). Pet. App. 20a n.7. On appeal, all the BOCs argued that the uncontested motion for removal of the information services restriction was governed by section VII.[9] Therefore, there is no basis for petitioners' argument that the parties have consistently interpreted the decree to require the application of section VIII(C) to uncontested as well as contested modifications.

3. Contrary to petitioners' claim (Pet. 21-24), the court of appeals' decision does not conflict with the decisions of other circuits on the standard of review governing consent decree interpretation. As petitioners acknowledge (Pet. 22 n.39), the other courts of appeals uniformly agree with the court in this case that the interpretation of a consent decree is reviewable *de novo*. *Keith* v. *Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986); *Vertex Distributing, Inc.* v. *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982) (citing cases in other circuits); see cases cited at Pet. 22 n.37. Nonetheless, petitioners ask this Court to reject or limit that universally accepted *de novo* standard. Pet. 22-23. They argue that the courts of appeals should pay "special" deference to interpretations of district courts that have extensive experience in administering a decree.[10]

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[9] The United States took no position on the issue. Pet. App. 25a n.11.

[10] Petitioners also suggest (Pet. 23 n.40) that a "clearly erroneous" standard, rather than a *de novo* standard, should apply when a decree provision is "ambiguous" (relying on contract cases outside the consent decree area). While, as the court of appeals here acknowledged (Pet. App. 23a), factual findings are reviewed under a "clearly erroneous" standard, the "interpretation of Section VIII(C)" (Pet. 23

Not one of the cases on which petitioners rely (Pet. 22 & nn.36-37), however, holds that a court of appeals must give "special deference" to a district court's interpretation that the court finds to be contrary to the express language and history of the decree. Indeed, in the cases relied on, the reviewing courts carefully undertook an independent examination of the decree language and its history to fulfill their "primary goal," which is "to discern the intent of the parties as embodied in the agreement." *Ferrell* v. *Pierce*, 743 F.2d 454, 461 (7th Cir. 1984); see also *Brown* v. *Neeb*, 644 F.2d 551, 558 (6th Cir. 1981). Courts that ultimately "deferred" to the district court based their holdings on their independent examination of the language of the decree and the parties' intent, which convinced them that the district court had not erred. *Keith* v. *Volpe, supra*; *Vertex Distributing, Inc.*, 689 F.2d at 892-893 (court of appeals refused to "rewrite" decree to suit purposes of one of the parties). But courts finding that a district court's interpretation was wrong have not hesitated to overturn it. *AMF, Inc.* v. *Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (refused to defer to district court's interpretation); *United States* v. *Chicago Board of Education*, 717 F.2d 378, 382 (7th Cir. 1983) (district court erred in holding decree provision "unambiguous").[11]

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n.40) is not such a factual finding. The consistent line of court of appeals precedent cited at Pet. 22 nn.36-37 so holds. See also *ITT Continental Baking Co.*, 420 U.S. at 238 & n.11, 243.

[11] Moreover, any reason for deferring to a district court's post-entry decree interpretations has substantially less force where, as here, the court of appeals itself has had extensive experience overseeing the decree. See *United States* v. *Western Electric Co.*, 777 F.2d 23 (D.C. Cir. 1985); *United States* v. *Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987) (out-of-region exchange services); *United States* v. *Western Electric Co.*, 846 F.2d 1422 (D.C. Cir. 1988) (non-discrimination provision); *United States* v. *Western*

Moreover, the court of appeals did pay special heed to the district court's contemporaneous interpretations of section VIII(C) (cf. Pet. 24), taking "careful account of the explanatory opinion issued by the district judge at the time the decree was entered." Pet. App. 24a n.10. As petitioners acknowledge (Pet. 24), sound decree construction ultimately rests on "fidelity to *contemporaneous* understandings that were the basis for the accords" (emphasis added).[12] The court of appeals, faithful to this precept, examined with care the circumstances surrounding entry of the decree and the district court's contemporaneous expressions concerning incorporation of section VIII(C) to ascertain the parties' intention in adding this language to the decree. The conclusion that section VIII(C) governs only contested modifications is solidly grounded in that history.

4. Review is also unwarranted at this juncture because the court of appeals' decision is interlocutory. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389

Electric Co., 894 F.2d 430 (D.C. Cir. 1990) (conditional interests); *United States* v. *Western Electric Co*, 894 F.2d 1387 (D.C. Cir. 1990) (meaning of "manufacture"); *United States* v. *Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990) (Triennial Review); see also *United States* v. *Western Electric Co.*, No. 89-5034 (D.C. Cir. June 12, 1990) (Gateways); *United States* v. *Western Electric Co.*, No. 87-5403 (D.C. Cir. July 13, 1990) (procurement services); *United States* v. *Western Electric Co.*, appeal pending, No. 89-5106 (D.C. Cir.) (multiLATA paging); *United States* v. *Western Electric Co.*, appeal pending, No. 89-5421 (D.C. Cir.) (hearing impaired services).

[12] See also *Atlantic Refining*, 360 U.S. at 24 n.4 (it is the *contemporaneous* construction by those charged with the administration of the act [that] are[] entitled to respectful consideration").

U.S. 327, 328 (1967); cf. *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964), and *Estelle* v. *Gamble*, 429 U.S. 97, 114-115 (1976) (Stevens, J., dissenting) (both cases referring to Court's "usual" or "normal" practice denying interlocutory review). The order remanding for consideration under section VII does not compel the district court to reach any particular result; it only requires the district court to approve the modification if it concludes that it satisfies the public interest standard. If the district court retains the restriction prohibiting the BOCs from providing information services, petitioners will not be aggrieved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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